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"The Rule of Law Today", Association of Trial Lawyers of America

Max S. Baucus

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United States Senate

WASHINGTON, DC 20510-2602

"The Rule of Law Today"

Senator Max Baucus
Association of Trial Lawyers of America
Boston, Massachusetts

July 29, 1996

Good afternoon. Thank you for inviting me to speak with you here today.

It's great to be here in Boston. You have chosen a perfect location for your 50th Anniversary conference.

Bostonian lawyers, from John Hancock, to John Quincy Adams, to Oliver Wendell Holmes to Justice Breyer have helped write and interpret laws in every field. Schools like Harvard and Boston College trained some of our America's great judges, legal scholars and public servants. And of course, the Association of Trial Lawyers of America was itself born here in 1946.

THE RULE OF LAW

If any of ATLA's founders are here today, they can tell you how much Boston has changed since then. In the past twenty years, the Hancock Tower and the downtown skyscrapers have given Boston a new skyline. The high-tech corridor along Route 128 has transformed the New England economy. The Charles River is recovering for fishing, boating and swimming.

These are signs of broader changes in our country, and the world as a whole. The end of the Cold War. The economic boom in East Asia and the growth of the global economy. Revolutionary changes in health and medicine, and broader developments in science and technology that change every aspect of our daily life.

At such a time, we should look hard at our laws and institutions and make sure they still meet our needs. But we should also recognize that some things have not changed -- not since ATLA's first Convention in 1946; not even since the American Revolution began here in 1776.

Things like our natural heritage of unspoiled lands and wildlife. Our tradition of civic activism and voluntary service. And perhaps most important, our basic rights and freedoms.

As Americans, we have the right to vote and contribute to the decisions our country makes on every subject, from national defense to local school funding to scientific research.

We have the freedom to speak our minds and to share the facts through an open media.

And we have the rule of law that protects us against abuse of power by governments, corporations or powerful individuals.

That is a precious thing. Reverence for this institution is why many of us chose to study the law. And it is why we are proud we made that choice.

SHAKESPEARE, CHAUCER AND MORE

I would say, though, that this sense of reverence for the law is not universally shared in America today. All lawyers are aware of the public displeasure with our profession.

Lawyers have become regular scapegoats in Congressional debates and Presidential campaigns.

Students at the University of Montana Law School sometimes wear T-shirts reading "Friends Don't Let Friends go to Law School."

A National Law Journal poll found that nearly a third of Americans believe lawyers are less honest than other people.

Of course, displeasure with lawyers is nothing new. You are all familiar with the famous line in Shakespeare's Henry VI, Part II -- "first, let's kill all the lawyers." You might have seen that on T-shirts too. Two hundred years earlier, in The Canterbury Tales, Geoffrey Chaucer's Man of Law lectures his fellow pilgrims on the virtue of wealth and says "better to be dead than poor." Even St. Thomas More wrote in Utopia that his ideal society had no lawyers.

So the unpleasant stereotype of lawyers is an old one. But the strength of today it is disturbing to me, for two big reasons.

LAWYERS IN MONTANA

One, it is disturbing because it is wrong. We all know that some lawyers -- like some politicians, business executives, bricklayers, waiters, doctors or teachers -- do not live up to the standards we should expect of ourselves. Some take up cases they know have no merit. Some are not entirely honest. But the vast majority are good, ethical professionals. And many lawyers practice in ways that are inspiring or even heroic.

I think of my friend Nick Murnion, the county prosecutor in Jordan, Montana. Nick did the legal work to file cases against the "freemen" you probably saw on TV this spring. He lives in a county the size of Connecticut, with 1500 citizens and two permanent police officers. For two years, Nick filed charges and tried freemen for fraud, conspiracy and threatening public officials -- all while a group of ten to twenty heavily armed sociopaths threatened to kidnap him, "try" him in some kind of self-appointed court and then hang him from a bridge outside town.

Or Deborah Anspach, with Montana Legal Services. She won a suit getting a young woman on welfare tuition assistance. With the money, this woman got off welfare and finished school. She is now a professor.

Or Randy Bishop, another lawyer friend from Billings. He worked on a pro bono case involving a suit against the Medicaid bureaucracy, which helped a five-year-old boy get an operation to cure his scoliosis.

These people -- and each of you can think of more examples -- are the reality of the legal profession today.

JURY NULLIFICATION

And two, the public discontent with lawyers disturbs me because it is a little dangerous. If we do not understand the rule of law and the role of lawyers, we will make some decisions that make America a significantly worse place to live.

Let me give you an example. I mentioned the "freemen" and "militias" a few minutes ago. There aren't many of these people in Montana -- about thirty to fifty in the state -- and they have no public support to speak of. But some of their thinking is creeping into the mainstream.

In June, Montana's Republican Party, probably without understanding what it was doing, put in its Platform a clause called "fully informed jury," stating that jurors ought to be able to ignore the laws and the evidence when they decide cases. Jurors could let clearly guilty murderers off, or convict innocent people even if the law and the evidence would not support a conviction. The idea is the brainchild of a man named "Red" Beckman, a well-known right-wing extremist and Holocaust denier who lives near Billings and whose books and videotapes are sold through militia catalogs and computer networks.

Why did that happen? How could the Montana Republican Party -- which is often wrong but not usually crazy -- adopt something like that? Well, the man who introduced the clause has a specific goal. He wants juries to be able to nullify the law against blocking access to abortion and family planning clinics. As to the rest of the delegates, I don't know. I can only guess that they don't understand the legal system and don't care about its fundamental principles.

LEGISLATION BY HORROR STORY

Then let's look at the area in which many of you practice -- product liability. Supporters of federal product liability reform are of course not kooks and represent a serious point of view. But they sometimes show the same indifference to basic legal issues the Montana Republican Party showed on the "fully informed jury" issue.

One example is their tendency to "legislate by horror story." That is, to cite a couple of excessive jury awards to plaintiffs, or complain about the high price of ladders, and use these

anecdotes rather legal principle to justify a sweeping change in our jury system.

There are certainly some bad awards. But most "horror stories" seem a bit different on closer examination. Remember the case Ian Frazier described in the New Yorker a few years ago. That is, the suit filed against the Acme Company by Wile E. Coyote.

Mr. Coyote sued after a malfunctioning Acme Rocket Sled left him compressed to the height of eight inches and folded up like an accordion. This followed similar accidents with the Acme "Little Giant" Firecracker and the Acme Spring-Powered Shoes. He asked for \$21 million in actual and general damages for mental anguish, damaged reputation and days lost from work, plus \$17 million in punitive damages and \$750,000 in attorney's fees.

It sounds ridiculous. But if you think about it, in real life wouldn't Wile E. Coyote be right to sue the Acme Company? As Mr. Frazier puts it:

"Defendant has used its market advantage to the detriment of the consumer of such specialized products as itching powder, giant kites, Burmese tiger traps, anvils and two-hundred-foot-long rubber bands... One can only wonder what our trading partners in Western Europe and Japan would make of such a situation, where a giant company is allowed to victimize the consumer in the most reckless and wrongful manner over and over again."

Many real awards that look like outrages on first glance are like Mr. Coyote's claim -- weird in appearance but justified on the merits. And the rare cases of genuine outrages are no reason to erase a basic principle of our federal Constitution -- the right of the states to decide their own civil laws. When Congress steps into an area that states have run for two hundred years, it ought to have more than a few horror stories. It should have a compelling, logical reason.

REASONS FOR FEDERAL LAWS

And sometimes these reasons do exist.

When Congress passed civil rights laws in the mid-sixties, it had a reason based on legal principle: a group of states had denied basic individual rights for many decades.

When our national environmental laws passed a decade later, we had a practical reason - science and common sense showed that pollution and loss of habitat were cross-border problems which required national laws to solve.

Congress had good reason to step in on both issues. If you want Congress to do the same on product liability, you must go beyond anecdotes about the price of ladders and individual cases. You must make an argument as strong as the ones which existed in civil rights or environmental protection.

Supporters of a federal product liability law make three attempts at such an argument. First, the number of product liability suits is growing rapidly. Second, these suits are too expensive. And third, the suits are provoked by a legal profession which is growing too fast and trying to create work for itself. So let's look at these arguments closely.

LAWSUITS AND LAWYERS

How many suits are there? The U.S. Districts Courts reported 34,600 federal product liability cases commenced or pending in 1985, and 38,600 in 1994. To use another measure, the District Courts conducted 9,500 federal civil trials in 1970; 10,100 civil trials in 1980; 9,200 in 1990 and 7,900 in 1994. Our Montana experience also is a more or less stable caseload over time. The facts don't say whether we have too many lawsuits -- or for that matter too few -- but they do show there is no emergency.

How much do these suits cost? The advocates of national tort reform simply don't know. If you read the debate in the Congressional Record, you will find Senator Gorton saying:

"Estimates of total costs of litigation and associated activities range from some \$80 to \$117 billion a year."

That is based on a 1989 prediction by the insurance industry. Another Senator says product liability suits cost Americans "\$152 billion" a year. A third says it's "\$1,200 for every American" -- i.e., \$298 billion.

The fact is, they are just guessing. But assume for the sake of argument that Sen. Gorton's figure of \$117 billion is correct. He is the sponsor and presumably knows the issue best. A few minutes of research will show that according to the Statistical Abstract of the United States, personal injuries cost America \$441 billion in 1994. That includes \$246 billion in lost wages and productivity plus costs to employers.

So the economic cost of personal injuries is twice as much as all civil litigation put together. And it could be worse, since personal injury rates are down by 41% since 1975. The decline stems at least in part from the consumer safety movement and its use of tort laws. So if we passed this bill, it is at least conceivable that businesses would lose more money through a higher accident rate than they gain through fewer lawsuits.

Finally, is the legal profession growing too fast? When I entered law school in 1960, America had 286,000 lawyers. Today there are 806,000. In the same time, the number of total jobs grew from 54 million to 124 million. And the number of incorporated businesses rose from 1.1 million to 3.8 million. So the legal profession is growing a bit faster than total employment, and a bit slower than the business community. It is just wrong to say we have an explosion of lawyers.

All this means one thing -- advocates of national product liability reform have not made

their case. The growth of product liability lawsuits is small. The thesis of a crisis in legal costs is unproven at best. And the claim that the legal profession is growing by leaps and bounds is untrue.

THE LEGAL SYSTEM AT WORK

Now, there are certainly some problems in the civil justice system. As a society, I think we are a little too litigious. That applies to both individuals and businesses. And some lawyers take advantage of this in ways they should not. Likewise, there are problems in the criminal system. Cases take too long to resolve. Victims of crime should have more influence than they do.

But neither system is in "crisis" or "collapse." In most cases the profession itself can deal with the problems that do exist. And states can handle the rest -- as Montana has done, as Massachusetts has done, and as I'm sure most states do.

And these problems must not obscure the larger truth. That is, on the whole, our legal system works. It protects the rights of citizens. It deals justly with plaintiffs and defendants. It makes our Constitution's vision of equality a reality. And much of that is due to the hard work, persistence, and idealism of lawyers.

CONCLUSION

That is the reality, and we should not keep it to ourselves. We should be open and public about setting high standards and disciplining lawyers who do not meet them. But we should also make sure the public understands the work lawyers do for good and the value of our legal institutions.

If we fail to do that, public faith in the rule of law will continue to erode. That will be bad for lawyers and the legal profession. But much more important, it will be dangerous for our country.

Shakespeare himself understood why. "First, let's kill all the lawyers" is the most universally misunderstood line in all his works. John Cade, the revolutionary who wants to kill lawyers, plans to follow up by killing everybody else who can read and write. And he does it in pursuit of a specific vision:

"All shall eat and drink on my score, and I will apparel them all in one livery, that they may agree like brothers, and worship me their lord."

This play was written more than four hundred years ago. In many ways the world now is totally different. But while the play is old, its message is very modern.

Cade hopes to create a world in which people depend on the state for sustenance, dress

alike, say the same things and serve an absolute ruler. If this vision sounds familiar, it should. It has been carried out twice just since I left Stanford Law School -- once by Mao in China and once by Pol Pot in Cambodia. These modern dictators too began by destroying the institutions which protect citizens from arbitrary power -- that is, lawyers and the law. That is where totalitarian rule begins.

That is why it is so important to defend our rule of law. It is our responsibility as lawyers to make sure the public understands and values our legal principles and institutions, and that is a noble calling.

Each of you chose early in your life to learn the law, to practice the law, and to protect the law. It was a good choice. And you should be proud of it.

Thank you.